APPENDIX A

BEFORE THE INDIAN CLAIMS COMMISSION

DOCKET No. 135

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA, *et al.*, THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, THE SAC AND FOX TRIBE OF MISSOURI, and SAC AND FOX TRIBE OF MISSISSIPPI IN IOWA, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: Aug. 29, 1963

Appearances:

Brian Sullivan, Attorney for Iowa Tribe, Kansas and Nebraska.

Nicholas C. English, Attorney for Iowa Tribe, Oklahoma.

George B. Pletsch, Attorney for Sac and Fox Tribe, Oklahoma.

Stanford Clinton, Attorney for Sac and Fox Tribe, Missouri.

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Lawrence C. Mills, Attorney for Sac and Fox of the Mississippi.

Walter J. Muir, with whom was Mr. Assistant Attorney General *Ramsey Clark,* Attorneys for the Defendant.

Opinion of the Commission

Watkins, Chief Commissioner, delivered the opinion of the Commission.

On July 2, 1958, this Commission decided that the ancestors of two tribal claimants, the Iowa Nation and the Sac and Fox Nation, aboriginally owned and ceded to the United States two separate tracts in northern Missouri under the treaties of August 4, 1824 (7 Stat. 229; 7 Stat. 231), *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska et al.* v. *The United States,* 6 Ind. Cl. Comm. 464.

Now we must properly evaluate each tract, that is, we must estimate their fair market value as of the effective date of purchase, and having made these determinations, we must then decide whether the United States paid an unconscionably low consideration to each tribe as would permit the tribal claimants herein to recover further compensation. The agreed date of valuation is January 18, 1825. On that day President Monroe officially proclaimed both treaties "in pursuance of the advice and consent of the Senate as expressed by their resolutions of the thirteenth instant." (Comm. Fdg. 25)

In narrowing the issues as stated above, this Commission rejects as in applicable to the facts in this case, two theories of recovery advanced by both tribal claimants, but more strongly urged upon us by the Iowa Indians.

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Under the first theory of recovery, it is contended that there was no actual or open market for the ceded tracts on the agreed evaluation date, nor, and what is more important, is there any evidence upon which this Commission could rightfully fix an 1825 fair market value. Therefore, argue the petitioners, the tribal claimants are entitled to be compensated for the ceded tracts at the rate of $1.25 per acre, which figure was the then prevailing statutory minimum price for the purchase of government lands. (Citing *The Miami Tribe of Oklahoma et al.* v. *United States* (1956), 175 Fed. Supp. 926, and *New York Indians* v. *United States,* 170 U. S. 1, 18 S. Ct. 735, 42 L. Ed. 1163). The Commission will concede that there was no open or actual market for these lands in the true sense of the word as of the effective cession dates, but our numerous and detailed findings made herein attest to the plain fact that the Commission has found more than ample evidence upon which to estimate their 1825 fair market value. In so doing we have simply followed the criteria set down by the Court of Claims in the case of *Otoe and Missouri Tribe of Indians et al.* v. *United States,* 131 Ct. Cls. 593, 2 Ind. Cl. Comm. 335, and repeatedly followed by the Commission in many other cases where, as here, there has been no actual open market for ceded Indian lands at the time of cession. As stated by the Court of Claims in the *Otoe* case (pp. 633, 634),

> In the absence of a market at the time in question, and therefore the absence of evidence of 'market value' in the conventional sense, this court and the Commission have taken into consideration numerous other factors in determining the value of lands ceded by the Indians.

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> This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation—considering the ready markets at that time and the potential markets.
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> (See also, *Pawnee Indian Tribe et al.* v. *United States,* 8 Ind. Cl. Comm. 648, Affirmed April 4, 1962, Ct. Cls. Appeal No. 7-61).

The second theory of recovery espoused by the tribal claimants is founded upon a purported "constructive trust" that existed between the United States and the petitioners' ancestors with respect to the government's acquisition of the two subject tracts. This theory has nothing to do with fixing a fair market value to the subject lands, but the amount of any recovery is to be measured by the value of the consideration that the Government received in disposing of these lands through public sale or otherwise. As perhaps stated more forcibly in the words of the Iowa petitioners,

> The essence of the second theory of recovery is that the Government stands in the position of constructive trustee for the monetary equivalent in consideration in dollars worth which it received upon the transfer of the Iowa tract from the Government into other hands. (Proposed Findings of Fact and Brief on Issues of Valuation and Liability of Iowa Petitioners, p. 78).

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Briefly then, both claimants contend that the United States finds itself in the position of a constructive trustee because of its guardianward relationship to the tribal claimants; that the defendant trustee has breached its fiduciary duties to both tribal claimants from the fact "* * * that the defendant acquired the land for an unconscionable consideration * * *" and further, since "the defendant purchased from the Iowa Nation (and Sac and Fox Nation) property (-ties) which it was under a duty to handle or deal with for the benefit of the Iowa tribe (or Sac and Fox Nation)"* the defendant trustee has been unjustly enriched at the expense of the tribal claimants, and the Indians are entitled to recovery in money an amount equal to consideration received by the Government from its disposition of the subject tracts.

Without attempting to answer the petitioners' contentions singly, the Commission finds that this same equitable theory of recovery was considered and wholly rejected by the Court of Claims in the case of *The Sioux Tribe of Indians et al.* v. *United States*, 146 F. Supp. 229.

In the *Sioux* case, the tribal claimants argued that the correct value of their ceded lands was not the fair market value, or sales value as of the date of taking, but rather a sum equal to any royalties that could have been earned from leasing the rights to the minerals contained therein as well as for paying for all the timber lands. As stated by the Court of Claims:

> The basis of this theory of compensation is that because of the alleged legal relationship of guardian

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* Proposed Findings of Fact and Brief on Issues of Valuation and Liability of Iowa Petitioners, p. 135 (parenthetical material added).

> and ward existing between the Sioux and the United States, the United States had no power to appropriate the ward's property even on payment of its sales value, but only the power to manage that property for the continuing benefit of the ward and pay over to the ward the proceeds realized by the guardian's best efforts . . . The argument is, in effect, that the guardian-ward relationship existing between the U. S. Government and the Sioux Indians is the same fiduciary relationship that exists between the guardian and ward in private law. This being so, the Government's action in forcing the Indians to cede to it their land was a violation of their fiduciary duty to their wards to manage its property to the benefit of the wards.

Before rejecting the above theory of recovery in the Sioux case, the Court of Claims reiterated the fundamental principle of the Government's inherent and paramount right to extinguish the Indian title to land in which it has always held the fee subject to Indians' right of occupancy, and further, that in accomplishing this purpose, the Government's only obligation is to treat fairly with the Indians. Fair treatment means that the Indians must be justly compensated for the lands so taken. Then the court specifically met the issue and disposed of it as follows:

> The appellant's reliance on its guardian-ward theory of determining the conscionableness of the consideration is not well founded. If the United States was in any legal sense the guardian of the Sioux with respect to the property in question, there might be some merit to appellant's argument. However, we do not find that the legal relationship of guardian

> and ward did exist between the United States and the Sioux. While it has often been said by this court and the Supreme Court that the general relationship of the Government to the Indians of the United States is similar to that of a guardian and ward, it has never been held that such a general relationship amounts to a legal guardian ward relationship in the absence of some specific language to that effect in a treaty, agreement, or Act of Congress. In the absence of such specific language, the general relationship of the United States to the Indians has been that of a strong and powerful sovereign to a comparatively weak and defenseless people and because of that fact, the courts have likened the relationship to that of guardian and ward and held that doubts in treaties and agreements should be resolved in favor of the weak and defenseless party in such treaties and agreements. (146 Fed. Supp. 237, 238).

We have carefully considered the language in both 1824 treaties of cession and have found nothing in either of them that would give rise to any such fiduciary relationship that would impose upon the United States the trustee's duty of managing the lands involved herein for the benefit of the two Indian claimants. The Iowa petitioners have called our attention specifically to language in Article 4 of the 1824 Iowa Treaty as creating the exact trust relationship contended for. Article 4 states in part that,

> The undersigned Chiefs, for themselves, and all parts of the Ioway tribe, do acknowledge themselves and the said Ioway tribe, to be under the protection of the United States of America, and of no other sovereign whatsoever . . . (7 Stat. 231).

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The Sac and Fox petitioners direct our attention to the language in Article 1 of the earlier treaty of November 3, 1804 (7 Stat. 84) as accomplishing the same thing.

The Commission has dealt with the identical contention by the tribal claimants in the case of *The Omaha Tribe of Nebraska et al.* v. *United States,* 6 Ind. Cl. Comm. 68. In rejecting the argument of the Omaha Indians, the Commission cited the earlier opinion of the Court of Claims in the case of *The Kansas Indians et al.* v. *The United States,* 80 C. Cls. 264. In the *Kansas* case, the Court of Claims explained the content and purpose of Article 3 of the 1815 Kansas treaty of peace wherein it was provided that the Kansas Indians "... do hereby acknowledge themselves to be under the protection of the United States of America, and no other Nation, Power or sovereign whatsoever . . ." (Art. 3, 7 Stat. 137). The Court said— (p. 302):

> The purpose and effect of the treaty were to place the contracting parties upon the same footing in every respect upon which they stood before the war with Great Britain. No contention is made that the relationship of guardian and ward existed between them before the war. Certainly this relationship could not be created by a treaty that merely reestablished their pre-existing political relations. The contention that this was the effect of Article 3 of the Treaty is without merit.

We conclude therefore that the Government's extinguishment of Indian title to Royce Area 69 under the two 1824 treaties of cession appears to be nothing more than outright purchase of the Sac and Fox and Iowa interests

thereto. Whether or not these purchases were made for an unconscionably low consideration is the question we will now decide after determining as best we are able the 1825 fair market value of both tracts.

The area which this Commission has awarded the Iowa claimants is a rectangular tract of land in northwestern Missouri lying south of the Iowa state line and containing 1,551,200 acres. It comprises all of present day Centry, Harrison, and Mercer counties, practically all of Worth and Grundy counties, and the northern portion of Daviess County. These counties were organized during the years 1836, 1845 and as late as 1861. Surveys of the subject tract did not begin until 1837, some 13 years after it had been ceded, and were not completed until 1845. Lands within the Iowa tract were not opened for private entry and sale under the public land laws until 1839.

The topographical and climatic features of the Iowa tract, as well as its soil, mineral, timber, and water content, have been detailed in the Commission's Findings 27 through 30. Briefly, the Iowa tract may be described as predominantly rolling prairie land with an abundance of streams, that give it both an adequate water supply and good drainage. The largest river flowing through the Iowa tract is the Grand River, which meanders in a southeasterly direction before emptying into the Missouri River some sixty miles to the south. There is ample timber along the stream valleys that would be valuable to potential settlers for building and fencing material, and also firewood. Soil conditions were relatively good in the Iowa tract. The soil was predominantly of a glacial till, which is the distinctive soil feature of northern Missouri. It was friable, generally well drained, and as of 1825 would be considered

rich, fertile, and above average. There was limestone available, but it had no commercial value in 1825. There were no other known mineral deposits of value in the Iowa tract as of 1825.

The climatic conditions that controlled the six months growing season in northern Missouri show a warm and humid climate in summer and relatively cold weather in the winter. The annual precipitation varies between 32 and 40 inches of rainfall.

Everything considered, the Iowa tract in 1825 was best adapated for small subsistence homestead farming with the larger prairie expense being ideal for pasturing livestock and horses.

It would be many years after the 1824 treaty of cession before the first settlers would put to good use the lands within the Iowa tract, for, as we shall discuss further, the Missouri territory was first peopled in those areas adjacent to its great rivers. Immediately after the close of the War of 1812, the westward thrust of new settlement and immigration, that crossed the Mississippi River, followed along and filled both sides of the Missouri River before turning inland. The Iowa tract was unfavorably situated with respect to the path of this new settlement, and in 1825 there was no real demand for these Iowa lands that would make them an attractive purchase on the public land market.

Seventy miles east of the Iowa lands was located the Sac and Fox tract in the extreme northeast corner of Missouri. It was bounded on the east and northeast by the Mississippi River and the Des Moines River. The Iowa state line was its northern boundary. The Sac and Fox tract

contains some 1,241,700 acres, and includes all of present day Lewis and Clark counties, most of Scotland County, the northeastern part of Knox County, and a small segment of Shelby County.

The Sac and Fox tract is also a part of the great north Missouri glacial plains, and is an area of relatively low relief, varying hardly more than a hundred feet between its highest and lowest elevations. It is more level than the Iowa tract with less rough lands. Many small streams wind through wide valleys with the water eventually draining into the Mississippi. A few of the larger streams were navigable for a short distance by small craft. On the eastern boundary of the Sac and Fox tract there is a wide bottom area of rich alluvial soil fronting on the Mississippi River. This bottom area was and still is subject to periodic inundation.

The timber supply in 1825 was ample in the Sac and Fox tract, although it was restricted to those areas along the slopes of the stream valleys.

Minerals were of no commercial value in the Sac and Fox tract as of 1825.

The Sac and Fox soil was derived from the same glacial material typical of all northern Missouri soils. As of 1825 these soils were above average in quality. Since both the Iowa tract and Sac and Fox tract had been equally glaciated, their surface features and contours were reasonably comparable. Based on soil ratings, there is little difference between the Iowa and Sac and Fox tracts, with little to choose between their overall productive capabilities (Tr. 494, 495, Testimony of Prof. H. H. Krusekopf).

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The Commission is of the opinion that like the Iowa tract, the lands within the Sac and Fox tract seem best adapated in 1825 to small scale or subsistence homestead farming with the level prairie lands being utilized for grazing purposes.

The Sac and Fox tract did enjoy one great advantage over the Iowa lands. It was readily accessible to and from the more populated areas *via* the great Mississippi River. While the tide of new immigration into Missouri during the early 1800's was not directed primarily up the Mississippi River, yet in the pre-1824 treaty days, there were settlers ensconced on several of the small streams that flowed through the extreme southern portion of the subject tract and in the areas immediately to the south. These streams, such as the Jeffreon, the North Fabius, the Wyaconda and Fox rivers, were navigable for short distances and flowed easily into the Mississippi River. In fact, there is no point within the Sac and Fox tract that can be counted more than 30 miles from either the Mississippi River or the Des Moines River. While 1825 steamboat travel on the Mississippi north of St. Louis is questionable, flatboats and keelboats could reach its upper regions and also ascend the Des Moines.

The 1825 Missouri traveler heading north could approach the southern boundary of the Sac and Fox tract by a road that extended as far as Palmyra. This was a small town in Marion County located just outside of the Sac and Fox tract. There were also two other nearby towns in existence as of 1825. One was the tiny settlement of Wyaconda, that was situated at the mouth of the Wyaconda River on the Mississippi River within the Sac and Fox tract. The other was the town of Hannibal in Marion County, which

was also located on the Mississippi River ten miles south of Palmyra. Actually, there had been settlers living in the Salt River area below the Sac and Fox tract as early as 1816. Another distinctive feature of the Sac and Fox tract at the time it was ceded, was the fact that the Government had already surveyed a goodly portion of the area as early as 1818. In addition there had been at least 644 public land sales within the tract during the years 1818 and 1819. We shall comment further on these sales.

All this pre-treaty activity both within and without the Sac and Fox tract indicates to the Commission that these lands were readily accessible to potential settlers, and that, unlike the situation surrounding the Iowa tract, there existed a limited demand for settlement of at least the southern portion of the Sac and Fox tract.

The Commission has gone into considerable detail in its findings of fact to outline the history of the early settlement of the northern Missouri up to the 1824 treaties of cession, including its economic and political development. We have shown that, after the United States acquired the Missouri territory as part of the 1803 Louisiana Purchase, there was concluded two important treaties of cession with the neighboring Sac and Fox Indians in 1804 (7 Stat. 84), and with the Osage Nation of Indians in 1808 (7 Stat. 107). Those two treaties seemingly extinguished all Indian title to those lands north of the Missouri River, and their proclamation was an important factor in stimulating further settlement westward along both sides of the Missouri.

In 1807 the two sons of Daniel Boone settled down on the Missouri River north of the Osage River in an area soon to be well known as the "Booneslick" area. This "Boonslick" area began to grow almost immediately. In 1811

there were at least 75 families located there. While the town of St. Charles, Missouri, which is located about 20 miles up the Missouri, had been established during the prior Spanish regime, its population rarely exceeded a hundred families prior to 1803. However, by 1811 its population exceeded a thousand souls.

The War of 1812 put a brake on the flow of immigration into the "Booneslick" area, but immediately after the close of hostilities the settlers began again to come in great numbers. In 1814 the entire Missouri population was nearly 25,000. In 1816 the area just north of the Missouri River and above the mouth of the Osage River was formed into Howard County, and the town of Franklin was set up in 1817 as its county seat. By 1818 Franklin had at least a 150 houses and was a thriving community. Further up the Missouri River the town of Chariton was established, and nearly five hundred inhabitants could be found living there and in the surrounding area. By 1820 there were over 21,000 people living in the "Booneslick" area, or nearly one-third of the entire Missouri population.

In 1820 the Missouri legislature established eight new counties along both sides of the Missouri as far as its then western border. The pattern of settlement in Missouri westward continued along both sides of the Missouri River, with the new settlers preferring the river lands and the adjacent stream valleys that provided the needed timber and the easy access to the main artery of transportation, the Missouri River. The development of the inland and plains area was to come at a later date. By 1820 over eighty percent of the male population was now engaged in some form of agricultural activity, and the farmers of that day still preferred to clear the wooded areas along the streams, rather than to tackle the tough prairie sod.

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Between 1803 and 1820 Missouri experienced relative prosperity centered around its growing farm economy. The influx of new settlers provided a local market for surplus farm products. In 1819 the United States had slipped into a general depression, but its effect did not reach Missouri until the early 1820's, when there was experienced a noticeable drop in local farm prices as well as a drop in new immigrants. Money never was too plentiful in Missouri in those early days. There were no banks and borrowers relied on private investors for loans upon which the Frontier interest rate was nearly 10 percent. By 1824 the economy began to firm up and there was an increase in new settlers, who, as soon as they arrived, would need land upon which to settle themselves and their families. Seemingly, as it developed, there was more than an adequate supply to satisfy their immediate demand.

As early as 1816 the Congress had authorized the survey of all public lands in the Missouri territory to which the Indian title had been extinguished. Two years later the then northern and western boundary lines of Missouri had been surveyed as well as some 9 million acres of public lands. By June 30, 1824, nearly 15 million acres of surveyed public lands were available for original entry in Missouri, and by the end of that year there were over 350 townships, some 8 million acres, north of the Missouri River that were subject to original entry.

Prior to the Act of April 24, 1820 (3 Stat. 566), public lands could be purchased for $2.00 per acre on credit in minimum tracts of 160 acres. Thereafter the minimum price was reduced to $1.25 cash with the minimum acreage fixed at 80 acres. The public land sale records for Missouri show that, between the time the first public lands

were sold in 1818 up until June 30, 1824, only 759,866 acres were sold, with the greater part being purchased in the years 1818 and 1819, while the credit system was still in effect. Obviously, during this period the supply of public land far outstrip the demand.

In 1821 some 400,000 acres of land were opened for public sale in the extreme portion of the state. These lands bordered on the Missouri River and were almost due south of the Iowa tract. The choice sites along the Missouri River were first taken up, but after five years on the market, only 9 percent or 36,000 acres had been sold.

East of the above lands there had been surveyed in 1816 in the northern part of what then was Howard County a tract of some 500,000 acres, known as the military bounty lands. These military bounty lands were in fact a part of a larger 800,000 acre tract that was situated south of, but reasonably near, both the Iowa tract and the Sac and Fox lands. The evidence and testimony adduced at trial showed that, for our purposes, the military bounty lands were reasonably comparable to both the Iowa and Sac and Fox tracts in physical characteristics and overall productive capabilities. Through the petitioners' efforts there is in evidence a collection of deed abstracts covering several volumes, which purport to show private conveyances of 40 acres or more, made between 1819 and 1830, of lands both within the military bounty tract, and of lands between the military bounty tract and the Missouri River. There is also included some of the "Booneslick" area on the north side of the river.

With the organization of Chariton County in 1820, it thereafter contained the bulk of the military bounty lands. An examination of the deed records from Chariton County

covering sales of the military bounty lands shows that, between 1819 and 1830, 150,101 acres were sold for a recited consideration of $132,694, or at an average per acre price of $0.84. Very likely most of these sales involved unimproved lands, since many of the grantors holding these military warrants lived great distances from the military tract, and preferred selling their patents rather than moving. Most of the military bounty sales had occurred during the years 1818 and 1819, and the Commission found strong evidence of speculative purchasing. One purchaser acquired over 10,000 acres at an average per acre price of $0.19, while five individual grantees managed to accumulate 51,000 acres of military bounty lands for an average of near $0.70 per acre.

The lands south of the military lands, particularly in the first several tiers of townships bordering the north side of the Missouri River were sold at a much higher price. These lands were near the towns of Chariton and Franklin and some of the older Booneslick settlements. These particular townships had been opened for original entry as early as 1818 and 1819. Between 1818 and into the early part of 1825, the deed abstracts from Howard County show some 150 private sales of 40 acres or more in which nearly 41½ thousand acres were sold at an average per acre price of $3.28. We noted some resales, and also that it was impossible to determine from the property descriptions the nature and extent of any improvements.

The petitioners have put in evidence abstracts of private sales made within the Sac and Fox tract covering the 23 year period 1826 through 1848. These abstracts were taken off the deed records of Marion, Lewis, Clark, Scotland, and Knox counties, with the first transactions being recorded

in Marion County in 1826. Up until 1830 only 22 private sales had been recorded in the entire Sac and Fox tract. The totals from all five counties show that during the 23 years that were covered just over 193,000 acres were sold at an average per acre price of $2.73 (Finding 64). In the case of these sales the Commission was unable to determine from the deed descriptions the nature, extent, and quality of any improvements.

As we mentioned earlier, public land sales in the Sac and Fox tract began as early as 1818, and for the two year period 1818-1819, some 644 public land sales took place within the Sac and Fox tract and in the area immediately to the south. Most of their transactions were credit sales when the minimum price was $2.00 per acre and the minimum acreage unit that could be purchased was 160 acres. With the abolition of credit sales in 1820, those who had acquired lands on credit, if they so desired, were now permitted to relinquish any unpaid acreage they had contracted for, or else, they could relinquish that which they had paid for, and take credit on other lands that now could be purchased at the minimum price of $1.25 per acre cash and in smaller 80-acre units. Many credit purchasers did in fact take advantage of these liberal provisions by abandoning their holdings in the Sac and Fox area, and relocating on new sites further south. After 1820 public land sales in the immediate Sac and Fox area practically ceased. In fact only 19 cash transactions involving public lands were noted in the Sac and Fox tract between the years 1819 and 1824.

While the abolition of the credit system certainly contributed to the diminished sales of public lands in the Sac and Fox area, the fact that Sac and Fox Nation did not

yet cede its tribal interests therein until 1824 must also be considered a factor. Nevertheless, there were vast amounts of public land available to potential settlers in eastern Missouri during the middle 1820's, and this over-abundance at $1.25 per acre could not help but depress and control the price of private sales, not only in 1825, but for many years thereafter.

Mr. Arthur S. Kirk, a qualified land appraiser, was offered by the defendant as an expert witness, and in the course of his testimony Mr. Kirk was permitted to express an opinion relative to 1825 fair market value of the Iowa and the Sac and Fox tracts. Mr. Kirk had also prepared and submitted an evaluation report on the two tracts. The historical and documentary material contained therein was most helpful to this Commission in arriving at its own independent appraisal of the two tracts. Mr. Kirk made a personal inspection of both tracts, and indicated that he personally relied upon the market data, or comparable sales approach, in reaching his conclusions on value. He testified that he attempted to put himself in the shoes of a potential 1824 buyer, who was willing and able to buy the subject tracts, and in this role, he considered among other things, the evidence of public and private sales of small tracts in and about the two areas as of 1824, the amount of other land available on the 1824 land market and its proximity to the tracts, their relative accessibility, the topographical features and the soil conditions of the two tracts, the available timber, minerals, and water supply, the climate, the existing transportation facilities, the population growth, and the general economic and political factors that would influence the 1825 land market.

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Mr. Kirk pictured both subject tracts as having no commercial or industrial use as of 1825, but were best adapted to small scale farming and for the raising of livestock. In his considered opinion the Iowa tract had an 1825 fair market value on the average of $0.20 per acre, while the Sac and Fox tract, having easier access to the Mississippi, had an 1825 market value on the average of $0.30 per acre.

While Mr. Kirk's testimony was, as was the testimony of all the expert witnesses, indeed enlightening and most helpful, the Commission has exercised its own independent judgment in arriving at an 1825 estimate of the fair market value of the two subject tracts. Considering the topographical and physiographic features of both tracts, as well as soil qualities and overall productive capabilities consistent with the highest and best use, the Commission finds little to choose between the two areas. However, we must give a distinct advantage to the favorable location of the Sac and Fox lands in 1825.

After the close of the War of 1812, northeastern Missouri managed to catch some of the new immigration and settlement that expanded across the Mississippi River into the Missouri territory, and then spread westward along both sides of the Missouri River. There was even a limited demand for lands within the Sac and Fox tract several years prior to the 1824 treaty of cession. A goodly portion of the subject tract had been surveyed in 1818. In the two years that followed there were recorded the first public land sales of Sac and Fox lands. At treaty time there existed several small settlements within the subject tract and in the adjacent areas to the south. The first private sales of Sac and Fox land were recorded in 1826.

On the other hand, the Iowa tract lay well to the north of the 1825 tide of immigration. That there was no demand for the Iowa lands immediately after the 1824 treaty of cession, is attested to by the fact that they were not surveyed and offered for public sale until some 15 to 20 years after they had been ceded.

The Iowa lands did have value though even in 1825, and we have found ample evidence upon which to estimate that value. In so doing the Commission has considered the 1825 topographical features of the Iowa tract, its natural resources, soil quality, timber, water, and mineral value, its nearness to market and transportation facilities, as well as the mass of evidence showing the public and private land sales of small tracts in the adjacent areas to the south and southeast of the subject tract, which for valuation purposes, we have found to be reasonably comparable.

Based upon the findings entered herein, and all the evidence in the record, the Commission is of the opinion that as of January 18, 1825, the Iowa tract, containing 1,551,200 acres, had a fair market value of $698,040.00, or an average value of $0.45 per acre.

On the same basis and considering all the factors as enumerated above and applicable to the Sac and Fox tract, the Commission is of the opinion that as of January 18, 1825, the Sac and Fox tract, containing 1,241,700 acres had a fair market value of $993,360.00 or an average value of $0.80 per acre.

As consideration for entering into a treaty of cession, and for ceding all their right, title, and interest to Royce Area 69, the United States, under the 1824 Iowa treaty,

agreed to pay to the Iowa tribe five hundred dollars in cash and merchandise, plus five hundred dollars annually for a period of ten years. It was further provided that as long as the President deemed it expedient, the United States was to provide blacksmith services and to supply the Iowa tribe with necessary farm utensils, livestock, and agricultural assistance. The defendant put in evidence a Government Accounting Office report which detailed all disbursements made to the Iowa Tribe or Nation of Indians under the 1824 Iowa treaty of cession. The Commission has found that, pursuant to said treaty, the United States disbursed for the benefit of the Iowa Tribe the sum of $19,846.23 which sum, when compared to 1825 fair market value of the Iowa tract of $698,040.00, was payment of an unconscionable consideration within the meaning of the Indian Claims Commission Act. The Iowa petitioners are therefore entitled to an interlocutory award of $678,-193.77 less any amounts the defendant may be entitled to set off as provided for in our Act.

For entering into a treaty of cession and for ceding all their right, title, and interest to Royce Area 69, the United States, under the 1824 Sac and Fox treaty of cession, obligated itself to pay to the Sac and Fox Nation the sum of one thousand dollars in cash and merchandise, plus the sum of one thousand dollars annually for a period of ten years, plus the sum of five hundred dollars to Maurice Blondeau "at the request of the Chiefs of the said Sac and Fox Nation, . . ." (Art. 3, 7 Stat. 229). The United States was also to provide blacksmith services to the Sac and Fox Nation for as long as the President deems expedient, as well as supplying them necessary farm utensils, livestock, and agricultural assistance for as long as the President deemed necessary.

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From the same Government Accounting Office report the Commission has found that the United States, in satisfaction of its 1824 treaty obligations, disbursed to the Sac and Fox Nation the sum of $27,799.61, which sum, when compared to the 1825 fair market value of the Sac and Fox tract of $993,360.00, amounts to payment of an unconscionable consideration under our Act. The Sac and Fox petitioners are therefore entitled to an interlocutory award of $965,560.39, less any amounts the defendant may be entitled to credit against said award as offsets.

ARTHUR V. WATKINS
Chief Commissioner.

We concur:

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 9-65

Ind. Cl. Comm. Docket No. 135
6 Ind. Cl. Comm. 464 (1958)
12 Ind. Cl. Comm. 487 (1963)
15 Ind. Cl. Comm. 248 (1965)

(Decided March 17, 1967)

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, *et al.*, THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA, *et al.*,

v.

THE UNITED STATES.

George B. Pletsch, attorney of record for the Sac and Fox Tribes, appellants. *Schiff, Hardin, Waite, Dorschel & Britton, Stanford Clinton, Lawrence C. Mills, Mills and Garrett*, and *Louis L. Rochmes*, of counsel.

Nicholas Conover English, attorney of record for the Iowa Tribes, appellants. *Brian Sullivan, Dykema, Wheat, Spencer, Goodnow & Trigg, McCarter & English* and *Louis Rochmes*, of counsel.

Walter J. Muir, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for appellee.

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Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

Opinion

SKELTON, Judge, delivered the opinion of the court:

The appellants, the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, and the Iowa Tribe of the Iowa Reservation in Oklahoma (hereinafter called the "Iowa"), are the sole successors in interest to the Iowa Nation of Indians and bring this suit on behalf of said nation and all its members.

The appellants, the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri, and the Sac and Fox Tribe of the Mississippi in Iowa (hereinafter called the "Sac and Fox"), each represented by individual members of the respective tribes, are the sole successors in interest to the rights of the Sac and Fox Nation. They maintain this suit on behalf of said nation and all of its members.

This is an appeal from decisions of the Indian Claims Commission[1] which held that:

(1) The Iowa held original Indian title to 1,551,200 acres of land in northwestern Missouri in what is designated on Royce's maps of Indian land cessions as Area 69 (sometimes called Cession 69),[2] which was part of the area ceded

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[1] 6 Ind. Cl. Comm. 464 (1958); 12 Ind. Cl. Comm. 487 (1963); 15 Ind. Cl. Comm. 248 (1965).

[2] 18th Annual Rep., B.A.E., 1896-1897, Part II.

to the United States pursuant to the Treaty of August 4, 1824;[3] and the sum of $19,846.23 paid to them by the Government was an unconscionable consideration for the land; and the fair market value of the ceded Indian lands as of January 18, 1825 (the effective date of the treaty) was 45 cents per acre or the total sum of $698,040, which the Iowa were entitled to receive, less allowable offsets in the sum of $45,000 and less the amount of $19,846.23 already paid, making the net amount to be paid the sum of $633,193.77.

(2) The Sac and Fox held original Indian title to 1,241,700 acres of land in northeastern Missouri in Area 69, which was part of the land ceded to the United States in the Treaty of 1824; and the $27,799.61 paid to them by the Government was an unconscionable consideration for the land; and the fair market value of their aboriginal lands as of January 18, 1825 (the effective date of the treaty), was 80 cents per acre or the total sum of $993,360, and accordingly, they should be paid such amount less the sum already paid, making the amount due the sum of $965,560.39.

(3) The Sac and Fox did not have recognized title to any of the land by reason of the Treaty of 1804 (7 Stat. 84) or any other treaty or act.

(4) The claims of both tribes that they held original title to additional lands in Area 69 were rejected.

(5) The Iowa were not entitled to a higher market value than 45 cents per acre for their aboriginal land.

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[3] 7 Stat. 231.

(6) There was no "constructive trust" existing in favor of the tribes because of an alleged fiduciary relationship between them and the Government, or for any other reason, which entitled them to be paid whatever profit it made when it later sold the land.

(7) The tribes were required to prove they had aboriginal title to their lands in 1803, and held such title until the date of the Treaty in 1824; and no evidence of Indian title acquired after 1803 could be considered because the Government acquired the sovereign title to all of the land in that year from France by the Louisiana Purchase.

The claims of both the Iowa and the Sac and Fox were tried together by the Indian Claims Commission and will be disposed of together in this appeal.

In this case both the Iowa and the Sac and Fox contend that: they held aboriginal title to more land than was awarded to them and consequently they were entitled to larger awards; because of the fiduciary relationship existing between them and the Government, a "constructive trust" was created under clause (2), section 2 of the Indian Claims Commission Act[4] which entitled them to the profit made by the United States when it later sold the land, or, in the alternative, clause (5), section 2 of the Act relating to fair and honorable dealings entitled them to such profits; and the Commission erred when it required them to prove aboriginal title as of 1803, the date of the Louisiana Purchase, instead of 1824, the date of the Treaty.

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[4] Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. § 70a (1964).

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In addition, the Iowa say that the land awarded to them should have been valued at 80 cents per acre instead of 45 cents; and the Sac and Fox allege that their award should be based on their title which was recognized by the United States in the Treaty of November 3, 1804,[5] instead of on aboriginal title.

Before discussing the issues, perhaps it would be well to describe briefly the background, history, way of life and geographical locations of the Iowas and the Sac and Fox tribes.[6] This should be particularly helpful in connection with their claims to land based on Indian or aboriginal title. Accordingly, for the sake of brevity, we set forth below the background description, location, and movements of these tribes prior to 1824, as made by the Indian Claims Commission, with such changes and additions as the record justifies.

I

The Iowa Nation of Indians, one of the "Chiwere" groups of the Sioux linguistic stock with a close affinity to the Oto and Missouri Indians originally came from east of the Mississippi. Early reports place the Iowa in the late seventeenth century around the Lake Okeboji region in northwestern Iowa and southwestern Minnesota. Sometime around the middle of the eighteenth century they departed this area and moved in a southerly direction down the Missouri River into the southwestern part of Iowa where they established a village just south of the present city of Council Bluffs, Iowa. From this village site, which

[5] 7 Stat. 84.

[6] A map is appended to this opinion for the sake of clarity.

is located northwest of Cession 69, the Iowa hunted the area southward along the Missouri River and east toward the western boundary of Cession 69. During this period this same area, which for the most part lies west and north of Cession 69, was utilized for hunting purposes by other Indian tribes such as the Omaha or Mahas, the Otoes and Missouris.

Sometime between 1755 and 1765, the Iowa Nation abandoned the village site at Council Bluffs, and moved slowly eastward across the southern part of Iowa to the Mississippi River, where eventually it chose to settle at a more permanent village site on the Des Moines River approximately 120 miles from the mouth of the Des Moines. This village lying north of Cession 69 is the best documented of all the Iowa village locations and the one which remained a principal Iowa village site during the years that followed until about 1823.

Two principal factors are attributed to the general exodus of the Iowa Nation from the Council Bluffs area. In the first place, the Iowas were being constantly harassed by their inveterate enemies from the north, the war-like Sioux, who were pressing from the northern plains and conducting extended forays into the western part of Iowa. Of greater moment was the fact that the Iowas desired closer contact with their Spanish and French traders whose operations were centered primarily in St. Louis. With the rapid growth of Indian trading activity, those tribes, including the Iowas, who inhabited this region became more dependent for the simple necessities of life upon what they could barter with furs and skins. Thus, the period throughout the latter part of the 1700's and into the nineteenth century was marked by an awesome exploitation of many

choice hunting grounds coupled with bloody and indecisive fights among competing tribes in search for new and more fertile hunting spots.

Having adapted themselves to the use of the horse, the Iowas hunted extensively west and southwest of their Des Moines River location across the southern part of Iowa to the Missouri and down into their old Council Bluffs hunting grounds, and in the plains between the Grand and Chariton Rivers toward their headwaters.

The Indian Claims Commission found as a fact in a prior case as follows:

> 32. During the period from approximately 1765 to 1812, the Iowa Nation hunted for furs in their traditional hunting grounds to the southwest of Cession 175 and these traditional hunting grounds were bounded as follows:
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> On the east by the watershed between the Grand and Chariton Rivers; on the south by the Missouri River; on the west by the Missouri River up to the western watershed of the Nodoway River and then by the watershed between the Nodoway and Nishnabotna Rivers; and on the north by the Des Moines River. [*The Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, Docket No. 158, 5 Ind. Cl. Comm. 367, 379 (1957).]

The record is replete with evidence that during the period from 1800 to 1824, the Iowas hunted over the entire western part of Area 69 (Cession 69) extending from the watershed between the Grand and Chariton Rivers on the east to the Missouri, Nodoway, and Nishnabotna Rivers on

the west, and from the Des Moines River on the north to the Missouri River on the south. Much of the evidence indicates they had villages scattered throughout this area during this period, although some of them were moved about from time to time. By 1800, they had driven the Missouri, Osage and Kansas Indians out of this entire territory and were in complete control of the land north of the Missouri River. Much of this evidence was obtained from statements, records and quotations from explorers, generals, governors, historians and others who visited or lived in the area during this period.

At the outbreak of the War of 1812 with Great Britain, the United States, through the offices of William Clark, Governor of this territory, invited the Iowans, as well as the Sac and Fox Indians, to leave their Mississippi and Des Moines River sites, and travel south and west across to the Missouri River. The obvious purpose of Clark's move was to place these Indians outside of the scope of British influence and separate them from their pro-English brethren. Shortly thereafter the Iowans temporarily removed from their Des Moines River site and filtered down to the south and southwest toward the Missouri River. Other members of the Iowa nation moved across the the Missouri where they joined with the Otoes and the Missouris. With the influx of these Indians into Cession 69, there developed agitation and hostility between the red men and the white settlers who were spotted along both sides of the Missouri River west of the Mississippi. Roving bands of Iowas and Sac and Fox found occasion to renew hostilities with the Osage. It was not until after the War of 1812 that the Iowas, who were now greatly divided, began to reassemble as a nation. Around 1820, they were reported back at their

old Des Moines River site but then abandoned it and built a new village on the Grand River in 1823, where the whole nation was reported to be living at one time. After negotiating the Treaty of August 4, 1824, the Iowas remained within Cession 69 only a short period and in 1827 they finally moved to a new village site on the Little Platte River, west of Cession 69. Throughout the period of their known history, the estimated population of the Iowa Nation rarely exceeded 1,000 persons.

These facts would seem to justify an examination of the evidence to determine whether or not at the time of the Treaty of 1824, the Iowa had actually, exclusively, and continuously used and occupied for a long time the western part of Cession 69 described above.

II

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with the other Indian tribes and in treaty negotiations and other matters with the United States.

It was shortly after this merger that the members of the Sac and Fox Nation began to establish themselves in Iowa. They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Missouri River. For the most

part the Fox Indians occupied the upper villages and the Sac Indians the lower villages, including the small village near the mouth of the Des Moines River. The principal Sac and Fox village sites prior to 1800, were located on the Rock River which is considerably north of the lands in controversy. Auguste Chouteau places the establishment of the Rock River location as 1764, while first references to the Sac village on the Des Moines River occur around 1780. All of these village sites are confirmed in subsequent reports, and in 1810, Zebulon Pike set them out specifically in a report on his 1805 Mississippi River expedition.

During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegaince to the cause of the United States departed their Mississippi River villages, and began to move down into Cession 69. There, during the years that followed, they were located at various places, and at times in the company of the Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers.

Having established their villages on the Mississippi around 1760, the Sac and Fox began to hunt the adjacent area on both sides of the river from as far north as Prairie du Chien to as far south as the mouth of the Illinois River. The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines river to the Missouri River, and includes generally the northeastern part of Cession 69 and all of Cession 50. Cession 50 lies immediately east of Cession 69 and west of the Mississippi, and embraces all those lands which were ceded to the United States by the Sac and Fox Treaty of 1804. The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810.

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During the period from 1795 to 1824, the Sac and Fox hunted extensively the area in the eastern and southern parts of Cession 69 from the Mississippi on the east to the Grand and Chariton Rivers on the west and from headwaters of such last-mentioned rivers on the north to the Missouri River on the south, and even beyond this area on the west and south. They were friendly with the Iowa and frequently hunted in the same area with them. The early explorers, traders, and military people supplied much of this evidence and information. For instance, in his 1806 Report to the Congress, Captain Lewis said that the Sac and Fox Nation sometimes hunted toward the Missouri and Lieutenant Pike in 1810, based on his explorations made in 1805, stated that the Sacs hunted on the Mississippi River and its tributaries from the Illinois River north to the River Iowa "and on the plains west of them which border the Missouri."

Captain Lewis in 1808 described the Fire Prairie, which is located near the southwest corner of Cession 69 as convenient to "the principal hunting grounds of the Ioways and Saucs."

The Missouri Gazette informed its readers in 1813 that more than 1500 Sac and Fox Indians had gone to their "wintering grounds, * * * besides those contained in 155 canoes which ascended the Missouri on Monday last, near 500 warriors crossed over by land."

Two years later, General Clark reported that members of the Sac and Fox Nation resided west to northwest of St. Louis on both sides of the Missouri River. In 1819, Major Long who had recently explored the Missouri River, stated that the Sac and Fox and Iowa Nations hunted on the

plains toward the sources of the Grand River. Indian Agent Sibley in 1820, reported that the Sac and Fox and Iowa Indians regularly made a fall hunt on the Missouri River. Sac and Fox Agent Forsyth mentions the presence of Sac and Fox along and near the Missouri River and in the vicinity of the Grand River in the years 1817 to 1820. In an extensive report concerning the Sac and Fox Nation which Agent Forsyth originally wrote in 1822, and later revised in 1827, he says that the members of the Sac and Fox Nation would hunt "on the waters of the Missouri River and its tributaries" and sometimes further west.

From about 1812 to 1825, the Sac and Fox Nation had a village on the north side of the Missouri River between the Chariton and Grand Rivers and therefore on the west boundary of the lands claimed in this appeal. An early settler reported that the Sac and Fox had a village in 1818 east of the Chariton River in present Randolph County, Missouri, near the present town of Yates. In 1819, there was a Sac camp on the Missouri River below Fort Osage and also near the mouth of the Grand River. For a time (1815-1818) there was also a Sac village south of the Missouri River near Jefferson City, Missouri.

During the period under consideration, it is estimated that the combined populations of the Sac and Fox tribes was between 4,400 and 6,500 persons.

It appears from all the facts that there was some basis for the claim of the Sac and Fox Nation that it had actual exclusive and continuous use and possession of the east and south portions of Cession 69 for a long time prior to the Treaty of 1824.

The United States made two separate but similar treaties with the Iowa and the Sac and Fox on August 4, 1824,

7 Stat. 229 and 7 Stat. 231, by the terms of which both tribes ceded to the United States all their right, title, interest, and claim to the lands in northern Missouri which are designated on Boyce's maps of Indian land cessions as Area 69 (18th Annual Rep., B.A.E. 1896-1897, Part II). Both tribes later filed a joint petition in this case with the Indian Claims Commission under the Indian Claims Commission Act, *supra,* seeking additional compensation for the cession of their respective tracts of land within Area 69 for all of the reasons set forth above.

III

We will consider first the issue raised by the Iowa and the Sac and Fox as to whether or not the Indian Claims Commission erred in making 1803 the cutoff date in establishing Indian title to the lands in question. Both tribes offered much evidence bearing on their acquisition of aboriginal title after 1803, and up to 1824, but the Commission refused to consider it, saying:

> Before turning our attention to those claims founded upon aboriginal use and occupancy, this comment may be in order. By virtue of the Louisiana Purchase of April 30, 1803 (8 Stat. 200), the United States acquired from France, subject to the present Indian right of occupancy, a vast expanse of territory which includes the lands in controversy. *The bulk of evidence* introduced by the petitioners in support of their claim of title cites events occurring just prior to and subsequent to the 1803 date. As we view the evidence of this case the 1803 date is critical to the issue of aboriginal title, since, in the absence of government recognition (which we

> have just rejected); these Indians were powerless to increase their aboriginal holdings after 1803. Therefore, each petitioner must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaties of cession in 1824.[7] [Emphasis supplied.]

It will be observed that the Commission itself states that *the bulk of evidence* offered by the tribes in support of Indian title cites events occurring just prior to and subsequent to 1803. The record supports this statement by the Commission. The sole question then, on this point, is, whether or not the Commission should have considered such evidence as proof of Indian title of the tribes to the land claimed by them in Cession 69. We think the Commission should have done so.

In refusing to consider the post 1803 evidence, the Commission appeared to have confused Indian title with sovereign or legal title, although there is a great difference between them. At any rate, the Commission took the position that once sovereign title attached to land, Indian title could not thereafter be established. We do not agree.

Chief Justice John Marshall thoroughly discussed sovereign title and Indian title in the early case of *Johnson & Graham's Lessee* v. *McIntosh*, 21 U. S. (8 Wheat.) 543, 570-603 (1823). He pointed out that when the various parts of the new world were discovered by explorers of the nations of Europe, a principle of international law was developed and recognized by all the nations to the effect that

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[7] 6 Ind. Cl. Comm. 464, 501-2 (1958).

discovery of new land carried with it the right of sovereignty or sovereign title to the discovered land which vested immediately in the sovereign of the nation whose explorer discovered it, subject to the right of use and occupancy by Indians living on it. Of course, the boundaries of discoveries were many times vague and indefinite, and this led to disputes and even wars between the nations over the sovereign or legal title or ownership to a given area of land. But the basic principle of sovereign title was recognized by all. It gave the sovereign the absolute right to sell, give or grant the legal title to another person or to another nation. No one questioned this right once sovereignty was established over land. It was inevitable such a system would develop in the scheme of things as it existed at the time of the new world discoveries. Obviously sovereign or legal title to land could not be in two different nations or persons at the same time, as no sale of it could ever be made under such circumstances.

However, the right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land. This right of use and occupancy by Indians came to be known as "Indian title." It is sometimes called "original title" or "aboriginal title." It is not the same as sovereign or legal title. Land owned by Indian title is owned by the tribe and not by an individual Indian. It must be used within the tribe and subject to its laws and customs and cannot be sold to another sovereign government nor to a citizen of any sovereign government. *Johnson & Graham's Lessee* v. *McIntosh, supra.*

This system of right of discovery and its inclusion of sovereign title subject to Indian title held by Indians liv-

ing on the land was accepted by the United States and became a part of its laws. *Johnson & Graham's Lessee* v. *McIntosh, supra; Worcester* v. *State of Georgia,* 31 U. S. (6 Pet.) 515 (1832). It has been observed and applied through the years by the Government in its acquisition and sale of land where Indian title existed. In cases involving these situations, the courts have held that sovereign or legal title to land, as distinguished from Indian or aboriginal title, may be obtained (aside from discovery or the purchase from the sovereign of a discoverer) by treaty, statute or an agreement. *Otoe and Missouria Tribe of Indians* v. *United States,* 131 Ct. Cl. 593, 608, 131 F. Supp. 265, 275 (1955), *cert. denied,* 350 U. S. 848.

Indian title has likewise been defined many times by the courts. For instance this court defined it in the case of *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 161 Ct. Cl. 189, 201-02, 315 F. 2d 896, 903 (1963), *cert. denied* 375 U. S. 921, as follows:

> * * * To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy "for a long time" prior to the loss of the property. (Cases omitted.)

See also *Confederated Tribes of the Warm Springs Reservation of Oregon* v. *United States,* App. No. 2-64, decided October 14, 1966, slip op. p. 6, and cases collected therein.

The courts have also construed the terms "use and occupancy" requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers. In the case of *Mitchel* v. *United States,* 34 U. S. (9 Pet.) 711, 745 (1835), the Supreme Court said:

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> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; * * *.

See also *Confederated Tribes of the Warm Springs Reservation of Oregon* v. *United States, supra.*

It is a matter of common knowledge that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously. New tribes would appear and old ones would disappear or move on to new territories. Sometimes land of one tribe would be exchanged for that of another, or one tribe would acquire the land of another as the result of an Indian war or by right of conquest.

In the case before us, the Indian Claims Commission approved and recognized the right of discovery doctrine with its attribute of sovereign title to land by holding that the United States acquired sovereign title to the lands in question in 1803, by virtue of the Louisiana Purchase from France. In other words, it held that France had sovereign title by right of discovery, subject to the right of use and occupancy by Indians living on it, and we purchased that title in 1803. Inferentially, if there had been any change in Indian title among the Indians using and occupying the land between the time of the French discovery and the French sale to our Government in 1803, such change would have been recognized. But the Commission froze all changes in Indian title as of 1803, and refused to consider any changes between that date and 1824, the date of the Treaty of Cession. If the Commission had been consistent, it would have frozen the date of changes of Indian

title as of the date of discovery of the land by the French instead of 1803. The Louisiana Purchase only gave us such title as the French had and there was no addition to the validity of the sovereign title to the land by our purchase of it in 1803—there was no magic to that date.

It would not be in accordance with facts nor history to freeze all Indian titles as of the date of the discovery of America, nor with our own Declaration of Independence in 1776. We know that there was considerable change in such titles after these dates. Consequently, it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise. In this case, that date is 1824, the date of the cession of the land to the United States by treaty.

By refusing to consider evidence of Indian title acquired after 1803, the Commission took the position, in effect, that since the United States acquired sovereign or legal title from France in 1803, no one—not even the Indians—could acquire any kind of title—not even Indian title—after that date except by grant from the Government itself. Such a position would be correct as to sovereign or legal title, but not as to Indian title.

We think the Commission committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824. Use and occupancy of a portion or of all of the land in question by them between these dates, especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy "for a long time" and sufficient to constitute Indian title to the land.

Accordingly, we remand this case to the Commission for its consideration of Indian title evidence between 1803 and

1824, so that it may determine from such evidence whether or not the land awarded to the Iowa or the Sac and Fox, or either of them, should be increased or changed in any way, and, if changed, to determine the change, if any, of the award to be made to them and to each of them all in accordance with this opinion.

IV

We hold that there is substantial evidence to support the decision of the Commission that the fair market value of the Iowa land as of January 18, 1825, was $0.45 per acre and the fair market value of the Sac and Fox tract as of that date was $0.80 per acre. However, upon remand of this case, should the Commission determine that the amount of land due either or both tribes should be changed or enlarged, the Commission will at the same time determine whether or not the per acre valuation of either or both tracts should be changed, and if so, the amount of such change.

V

We agree with the Commission that the United States did not recognize the title of the Sac and Fox to any of the land claimed in this case by the Treaty of November 3, 1804.

VI

The alternative theory of recovery advanced by the tribal claimants is founded upon a purported "constructive trust" that existed between the United States and the appellants' ancestors with respect to the defendant's acquisition of the two subject tracts. This theory is not concerned with fixing a fair market value to the lands in-

volved, but the amount of any recovery is to be measured by the value of the consideration that the defendant received in disposing of these lands through public sale or otherwise.

The main thrust of appellants' argument is that by virtue of certain legislative enactments such as the Trade and Intercourse Act of 1802, 2 Stat. 139,[8] a certain fiduci-

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[8] Section 12 of the Act of March 30, 1802, 2 Stat. 139, 143, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" is as follows:

"Sec. 12. *And be it further enacted.* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or trible of Indians, within the bonds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty."

Appellants also rely upon the following passage of the Northwest Ordinance originally adopted in 1787, and reenacted and confirmed on August 7, 1789, 1 Stat. 50, 52:

"ART. III. * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken

(Continued on following page)

ary relationship was placed on the United States with respect to appellants and that the defendant's payment of an unconscionable consideration for the lands involved

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(Continued from preceding page)

from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."

Appellants place emphasis on the following articles of their respective treaties:

"Treaty of August 4, 1824, 7 Stat. 231 (Iowa Tribe);

"ARTICLE 4th. The undersigned Chiefs, for themselves and all parts of the Ioway Tribe, do acknowledge themselves and the said Ioway Tribe, to be under the protection of the United States of America, and no other sovereign whatsoever; and they also stipulate, that the said Ioway Tribe will not hold any treaty with any foreign powers, individual state, or with individuals of any state.

"Treaty of November 3, 1804, 7 Stat. 84, 85 (Sac and Fox);

"ARTICLE 1. The United States receive the united Sac and Fox Tribes into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States, and of no other power whatsoever.

* * *

"ART. 4. The United States will never interrupt the said tribes in the possession of the lands which they rightfully claim, but will on the contrary protect them in the quiet enjoyment of the same against their own citizens and against all other white persons who may intrude upon them. And the said tribes do hereby engage that they will never sell their lands or any part thereof to any sovereign power, but the United States, nor to the citizens or subjects of any other sovereign power, nor to the citizens of the United States."

worked a fraud upon the Indian tribes resulting in the imposition of a "constructive trust."

In summary then, appellants contend that the defendant finds itself in the position of a constructive trustee because of its guardian-ward, or other fiduciary relationship to the tribal claimants; that the defendant breached its fiduciary duties when it acquired the subject tracts for an unconscionable consideration; and that this necessitates a recovery in a sum equal to the consideration received by the defendant from its disposition of their lands.

Appellants' reliance on the Trade and Intercourse Act of 1802, is prompted by our recent decision in *Seneca Nation* v. *United States*, 173 Ct. Cl. 917 (1965), which construed a prior version of this same Act. In that case, the Senecas sought to charge the United States for four sales of their lands by them, at allegedly inadequate prices, to private parties. As to three of the sales (those which occurred after the passage of the Act) we concluded that the Indian Claims Commission erred in failing to hold that, through the Trade and Intercourse Act, the United States had a special, a fiduciary, responsibility over sales to third parties to see that a proper and conscionable consideration was paid. We said that wherever the Act applied the United States would be liable under either clause (3) or clause (5) of section 2 of the Indian Claims Commission Act,[9] *supra*, as a fiduciary for an unconscionably low consideration received by the Indians.

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[9] Clauses (3) and (5) of section 2 provide: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe. * * *: (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, * * *; (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

The question, if there was one, of the measure of damages was not reached since the case was remanded to the Commission for a determination of whether consideration paid by the vendees was unconscionable.

From that case the appellants stride to the proposition that if the defendant can be held liable as a fiduciary to an Indian tribe for an unconscionable sale of tribal lands to a third party by the Indians, obviously the defendant should be fully accountable as a fiduciary to the Indians where it was a party to the unconscionable transaction.

Although we agree that the appellants should be compensated for their land, it does not follow in the circumstances of this case that the remedy for payment by the defendant of an unconscionable consideration is the imposition of a "constructive trust" compelling the defendant to disgorge whatever profit it made from subsequent sales to homesteaders.

As previously mentioned, we were not faced with that issue in *Seneca Nation, supra,* but it should be noted that section 12 of the Trade and Intercourse Act of 1802, related to transactions between Indian tribes and *third parties* and requires the consent of the Federal Government to any disposition of Indian lands to *third parties.* That Act adds little to judicial expressions that the Government in its dealings with the property of Indians, is a trustee. *Cf. Oneida Tribe* v. *United States,* 165 Ct. Cl. 487, 493 (1964), *cert. denied,* 379 U. S. 946.[10] But the label attached to the relationship by the courts, whether it be trustee, fiduciary, or guardian is unimportant alone and does not

[10] This statement is equally applicable to the provisions of the treaties and other acts the appellants rest upon for support.

control the measure of accountability. We must look to the language contained in the treaty, agreement, order, or statute under which the claim is brought to ascertain whether there exists, (1) a legal relationship wherein the United States is in fact and in law a trustee, fiduciary or guardian, or (2) a general relationship without any of such attributes or obligations, but which is described in the same terms by the courts. *United States* v. *Seminole Nation*, 146 Ct. Cl. 171, 181, 173 F. Supp. 784, 790 (1959); *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 189, 140 F. Supp. 776, 780-81 (1956). Compare *Ottawa Tribe* v. *United States*, 166 Ct. Cl. 373 (1964), *cert. denied*, 379 U. S. 929; *Navajo Tribe of Indians* v. *United States*, 176 Ct. Cl. ——, ——, 364 F. 2d 320, 322 (1966); see *Oneida Tribe, supra.* When this is done in this case, we are required to hold that the relationship between the parties was a general one in which there was no legal guardianship or resultant constructive trust.

Appellants can point to no language in the Trade and Intercourse Act, their treaties, or other legislation which would justify imposition upon the defendant of a liability greater than that which is ordinarily exacted in comparable situations, namely, the fair market value of the lands at the date of acquisition by the defendant. *United States* v. *Emigrant New York Indians*, App. No. 2-65, decided October 14, 1966, slip op. p. 19; *Sac and Fox Tribe of Indians of Oklahoma* v. *United States, supra*, 161 Ct. Cl. at 199, 315 F. 2d at 897; *Miami Tribe of Oklahoma* v. *United States*, 146 Ct. Cl. 421, 470, 175 F. Supp. 926, 954 (1959); *United States* v. *Kiowa, Commanche and Apache Tribes*, 143 Ct. Cl. 534, 541-42, 163 F. Supp. 603, 608 (1958); *Nooksack Tribe* v. *United States*, 162 Ct. Cl. 712, 718 (1963),

cert. denied, 375 U. S. 993; see *Otoe and Missouria Tribe of Indians* v. *United States, supra*, 131 Ct. Cl. at 632-33, 131 F. Supp. at 290.

In cases much stronger than the present where this court held that prices paid to the Indians for surplus unallotted *reservation* lands were unconscionable and that *duress* was exerted upon them by the defendant to complete the transaction, there was no suggestion that recovery of the net proceeds received by the defendant from white settlers would be proper. In fact, the court valued these surplus lands as of the date of ratification of an agreement with the Indians for the purchase of their lands for white settlement. *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 167 Ct. Cl. 710, 340 F. 2d 368 (1964).

We are not persuaded by the appellants' attempt to circumvent this rule by channeling their claim through clause (2) of section 2 of the Indian Claims Commission Act.[11] The defendant properly points out and the appellants do not contest that the rule they argue for would entirely eliminate the requirement that lands must be valued as of the date of acquisition.

Moreover, it has been recognized that not only is the measure of recovery the date of acquisition by the defendant under clause (3), but it is also the date of acquisition under clause (4), *Nooksack Tribe* v. *United States, supra;*

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[11] Clause (2) of section 2 provides: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, * * *: (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * *."

Appendix B

Sac and Fox Tribe of Indians of Oklahoma v. *United States, supra,* 161 Ct. Cl. at 199, 315 F. 2d at 897, and under clause (5). *United States* v. *Emigrant New York Indians, supra; United States* v. *Kiowa, Commanche and Apache Tribes, supra.*

Appellants' contention that claims involving payment of an unconscionable consideration asserted under clause (2) of section 2 of the Indian Claims Commission Act, are not the same as claims based solely upon unconscionable consideration under clause (3), lacks merit. We are of the opinion that a different rule of damages cannot be applied to a claim predicated upon payment of an unconscionable consideration, which is cognizable under different clauses of section 2, merely by the caption affixed to the pleadings.

We are satisfied that our prior standard of recovery under the Act does not at all restrict the legislative objectives, indeed, the briefs of the appellants in the instant matter make no such argument. We are content, therefore, to rest upon the principles of stare decisis and legislative acquiescence in the judicial interpretation of statutes. See *United States* v. *South Buffalo Ry. Co.*, 333 U. S. 771, 774-75 (1948); *Electric Battery Co.* v. *Shimadzy*, 307 U. S. 5, 14 (1939); *United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 500 (1936). To the extent that these principles afford a measure of stability and predictability in our legal system, they are of great value. Accordingly, the measure of recovery to be accorded the appellants in the circumstances of this case is the fair market value of their Indian title lands at the date of acquisition by the defendant, less allowable offsets and payments already made as determined by the Commission.

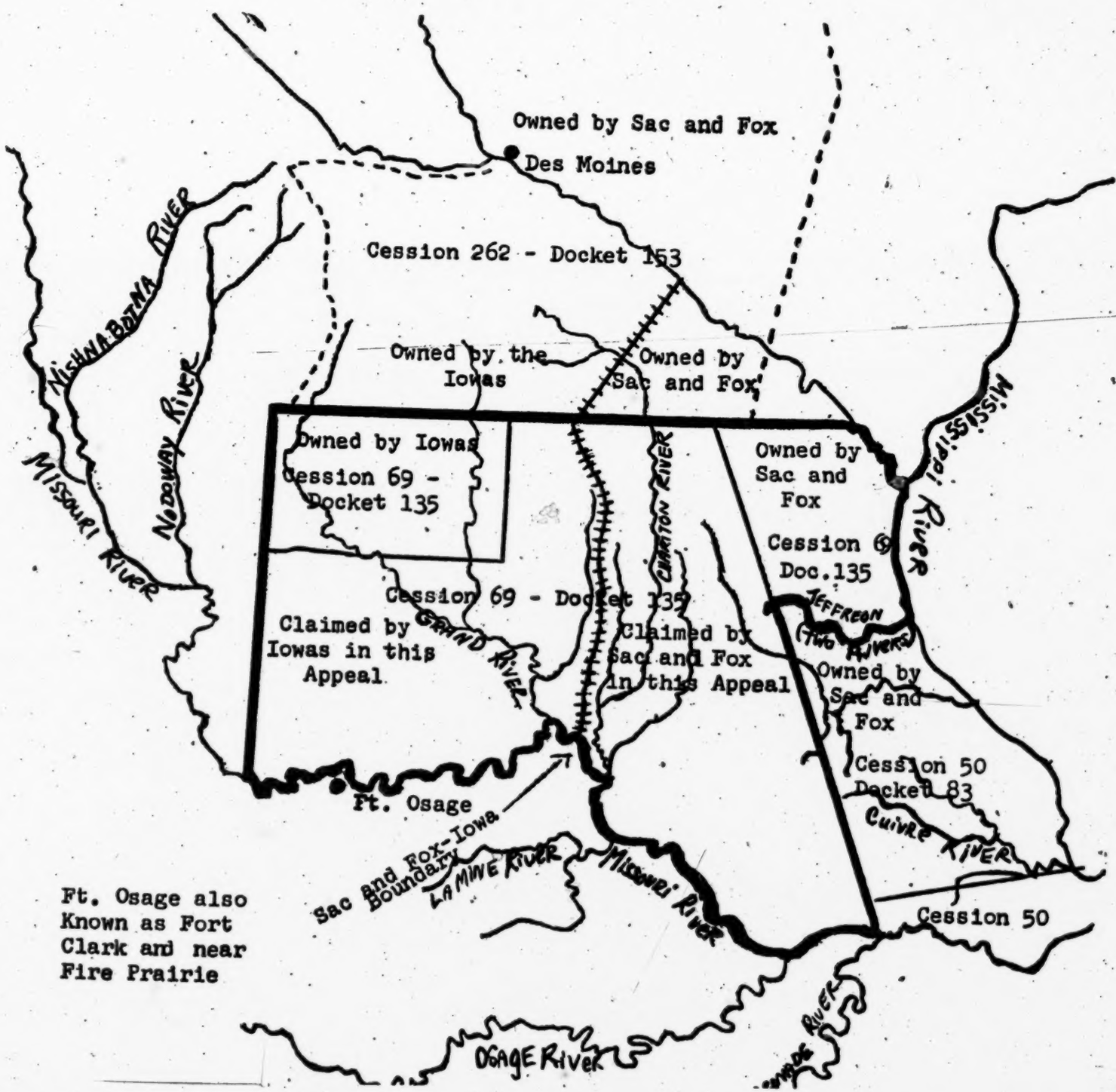
Appendix B

The decision of the Indian Claims Commission is affirmed in part and reversed in part, as indicated in this opinion, and the case is remanded to the Commission for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

[PHOTOSTAT]

(Opposite ☛)


Owned by Sac and Fox
Des Moines
Cession 262 - Docket 153
Owned by the Iowas
Owned by Sac and Fox
Owned by Iowas
Cession 69 - Docket 135
Owned by Sac and Fox
Cession 69 Doc. 135
Cession 69 - Docket 135
Claimed by Iowas in this Appeal
Claimed by Sac and Fox in this Appeal
Owned by Sac and Fox
Cession 50 Docket 83
Ft. Osage
Sac and Fox-Iowa Boundary
Cession 50
Ft. Osage also Known as Fort Clark and near Fire Prairie
Nishnabotna River
Nodoway River
Missouri River
Grand River
Grand River
Mississippi River
Jeffreon (Two Rivers)
Lamine River
Missouri River
Osage River
Gasconade River